No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,
v.
GWINNETT COUNTY PUBLIC SCHOOLS and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC., NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL HEAD INJURY FOUNDATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NATIONAL PARENT NETWORK ON DISABILITIES, PARALYZED VETERANS OF AMERICA, SPINA BIFIDA ASSOCIATION OF AMERICA, THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, AND UNITED CEREBRAL PALSY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici American Council of the Blind, *et al.* are twelve advocacy and service organizations nationwide that represent and serve the 43 million Americans with disabilities and their families. Each organization is actively involved in working to eliminate historical stereo-

types, prejudices and the resulting discriminatory practices and policies that serve to exclude Americans with disabilities from participating as valued and contributing members of our society.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities by federal law. In the Brief for the United States as *Amicus Curiae*, the Solicitor General invites the Court to examine whether compensatory damages are recoverable in private actions brought under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988) ("Section 504"), in the context of this case, which concerns the availability of compensatory damages for intentional violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (1988). *Amici* recognize that any interpretation of Section 504 will, in significant part, determine whether the federal mandate of nondiscrimination based on disability will be realized. *Amici* therefore submit the following brief in support of petitioner. (Copies of letters from the parties consenting to the *Amici* filing this brief have been filed with the clerk of the Court.)

Amicus American Council of the Blind ("ACB") is the nation's largest nonprofit membership organization of people who are blind and visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus Disability Rights Education and Defense Fund, Inc. ("DREDF") is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has

represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

Amicus National Association of the Deaf ("NAD") is a national nonprofit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems, Inc. ("NAPAS") is the national association of 55 state and territorial-wide protection and advocacy systems of persons with developmental disabilities, which were established under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C.A. §§ 6001 *et seq.* (1988). NAPAS members are charged with pursuing legal, administrative, and other appropriate remedies to protect the rights of persons with mental retardation and developmental disabilities.

Amicus National Council on Independent Living ("NCIL") was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL was organized in part to support independent living centers by conducting and coordinating the national advocacy efforts of the Independent Living Movement. Towards that end NCIL works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Head Injury Foundation ("NHIF") is a nonprofit organization dedicated to preventing head

injuries and to improving the quality of life for people with head injuries and their families. NHIF was formed in 1980 and has since grown to an organization of over 10,000 members, 44 state associations and over 400 support groups across the country. NHIF is an educational and support resource for the over two million individuals who sustain a head injury each year, family members, professionals, service providers and concerned friends.

Amicus National Multiple Sclerosis Society ("NMSS") is a nonprofit organization which is comprised of 140 chapters and branches with 400,000 members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment and prevention of multiple sclerosis (MS) and to improving the quality of life and enhancing independence for people with MS. NMSS advocates improvements in public policies that affect people with disabilities and their families. As part of its mandate, NMSS promotes laws to overcome discrimination and provide strong remedies for violations of the civil rights of people with disabilities.

Amicus National Parent Network on Disabilities ("NPND") is a national membership organization which represents over 500,000 parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons of all ages with a disability.

Amicus Paralyzed Veterans of America ("PVA") is a nonprofit organization chartered by the United States Congress and dedicated to serving the needs of its members—all of whom have catastrophic paralysis caused by spinal cord injury or disease. PVA has 33 chapters and 14 subchapters throughout the United States representing over 14,000 members. All of PVA's members are handicapped individuals within the definition of Section 504. PVA has been active in litigation and administra-

tive and legislative advocacy on behalf of people with disabilities and has worked to ensure the full implementation of rights guaranteed by Section 504. PVA operates a National Advocacy Program with the stated mission of promoting and defending the civil rights of all citizens with disabilities—veterans and non-veterans alike.

Amicus Spina Bifida Association of America ("SBAA") is a national nonprofit organization committed to guaranteeing the integration of people born with spina bifida into the mainstream of American society. SBAA works to promote national public awareness of and action on spina bifida, and to foster human rights and safeguard the well being of individuals with spina bifida. In furtherance of its goals, SBAA supports laws which strengthen civil rights protections for people with disabilities.

Amicus The Association for Retarded Citizens of the United States ("ARC") is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, the approximately 7,200,000 Americans with mental retardation. The ARC has a national membership of more than 140,000 people, including persons with mental retardation and their parents, and has approximately 1,300 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard the ARC as a leading advocate for citizens with mental retardation. Recognizing that people with mental retardation are among the highly vulnerable class of people with disabilities who may be subject to discrimination, the ARC has been heavily involved in legislative efforts to end such discrimination.

Amicus United Cerebral Palsy Association ("UCPA") is a national nonprofit voluntary health organization formed in 1949. UCPA assists its 162 affiliates through-

out the country in the provision of rehabilitation and related direct services, such as education and advocacy programs, and other activities designed to promote the welfare of people with disabilities.

SUMMARY OF ARGUMENT

In section I, we demonstrate that, if this Court holds that Title IX remedies are limited, such holding may not be automatically extended to Section 504.[1] Consistent with this Court's decisions in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), any examination of Section 504 remedies must include a full review of the legislative history of that provision. As this Court stated in *Consolidated Rail Corp.*, 465 U.S. at 633 n.13, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." Neither interested parties nor the lower courts have had an opportunity to address the issue of Section 504 remedies. The writ of certiorari herein was granted on the limited question of the availability of compensatory damages in a private cause of action alleging intentional discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* and, therefore, this Court should not address the availability of compensatory damages under the Rehabilitation Act without the benefit of a complete record.

Should the Court examine the Rehabilitation Act, we establish in section II that the plain language and legislative history of the Rehabilitation Act at the time of

[1] *Amici* believe, as established by the petitioner, and *amici* National Women's Law Center, *et al.* with respect to Title IX, and Lawyers' Committee for Civil Rights Under Law with respect to Title VI, that Title VI and Title IX include the full measure of remedies to redress violations of those statutes. Title VI and Title IX, like Section 504, evidence a strong congressional prohibition against discrimination, which would be frustrated by limiting the availability of remedies.

enactment and later amendments, evidence Congress' intent to allow recovery of compensatory damages for violations of Section 504. In 1973, when Congress made it unlawful to discriminate on the basis of disability, it did so against a backdrop of established Supreme Court precedent that damages were available to redress violations of civil rights, absent an explicit contrary intention by Congress. Moreover, the amendments to the Rehabilitation Act in 1978 were specifically intended to " 'enhance the ability of handicapped individuals to assure compliance' " with Section 504 and to ensure administrative consistency by making "available" administrative remedies, rights and procedures provided under Title VI of the Civil Rights Act of 1964 through Section 505(a)(2), 29 U.S.C. § 794a(a)(2) (1988). Nothing in the legislative history of the 1978 amendments evidences any intent to limit available remedies. To the contrary, the 1978 amendments further demonstrate Congress' intent to strengthen the remedies available to enforce Section 504.

We also show in section II that in 1986, Congress passed the Civil Rights and Remedies Equalization Act of 1986 ("Remedies Act"), 42 U.S.C. § 2000d-7 (1988), in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), so as to provide damages in Section 504 enforcement actions against states in federal courts. In *Atascadero*, the Court barred individual plaintiffs from recovering these damages in federal courts from states that violate Section 504 because Congress had not clearly abrogated the states' eleventh amendment immunity, nor had the states waived such immunity. In direct response to this decision, Congress enacted the Remedies Act, which provided (i) that states were not immune under the eleventh amendment for violations of Section 504, and (ii) that remedies "both at law and in equity" were equally available against both state and non-state entities. Congress could not have intended this statute to allow only injunctive

remedies against states because state officials were already subject to such remedies.

Moreover, by responding directly to a Supreme Court decision, and leaving intact prior well-established interpretations of Section 504 allowing for compensatory damages against non-state entities, Congress extended such remedies to actions against states. Finally, when Section 505(a)(2) of the Rehabilitation Act was reenacted in Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. § 12133 (West Supp. 1991), Congress made explicit its intent that this section include a "full panoply of remedies." Consequently, the legislative history of the Rehabilitation Act, its amendments, the Remedies Act and the ADA conclusively establish that compensatory damages are available to enforce Section 504.

ARGUMENT

I. THIS COURT SHOULD NOT DETERMINE IN THIS CASE WHETHER A JUDICIAL REMEDY FOR COMPENSATORY DAMAGES IS AVAILABLE UNDER SECTION 504

This case involves a high school student who brought suit for compensatory damages pursuant to Title IX, alleging intentional discrimination based on gender. The United States District Court for the Northern District of Georgia dismissed petitioner's complaint on the basis that compensatory damages are unavailable under Title IX. On appeal, the Eleventh Circuit affirmed the dismissal, holding that damages were unavailable under Title IX in that circuit, pursuant to Title VI precedent of that circuit.[2]

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[2] Because decisions of the former Fifth Circuit rendered prior to October 1, 1981 are binding precedent on the Eleventh Circuit, *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit relied on *Drayden* v. *Needville Independent School District*, 642 F.2d 129 (5th Cir. Unit A 1981), holding that damages were unavailable under Title VI. *Franklin* v. *Gwinnett County Public Schools*, 911 F.2d 617, 620 (11th Cir. 1990). As petitioner and *amici* demonstrate, compensatory damages are available under both Title VI and Title IX.

There has been no opportunity for interested parties to brief, or the courts below to consider, the issue of the availability of compensatory damages under Section 504. Hence, this issue is not properly before the Court. *See Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976); *Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220, 225 (1927).[3]

Moreover, to the extent that the Court limits the availability of damages under Title IX, this Court's previous decisions with respect to Section 504 caution against automatically extending such a limitation to the Rehabilitation Act. When faced with similar questions concerning the scope of Section 504 and its remedial provisions, this Court has resolved such issues in the context of a full examination of Section 504's legislative history. As the Court stated in *Consolidated Rail Corp.*, 465 U.S. at 633 n.12, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." Thus, in addressing the question of whether Section 604 of Title VI,[4] 42 U.S.C. § 2000d-3 (1988), applied to Section 504, the Court held, based on the language and the legislative history of the 1978 amendments to the Rehabilitation Act, that Congress had not intended to impose any limitations on Section 504 when it incorporated Title VI "remedies, procedures and rights" into Section 505(a)(2) in 1978. *Id.* at 635.

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[3] This Court is also not called upon to address the issues of the availability of a Section 1983, 42 U.S.C. § 1983, cause of action to redress violations of Section 504, Title VI or Title IX. The Eleventh Circuit's opinion expressly stated, "We do not here reach the question of any legal rights which Franklin may or may not have under * * * any federal statute other than Titles VI or IX." *Franklin*, 911 F.2d at 622 n.10.

[4] Section 604 prohibits recipients of federal financial assistance from engaging in racial discrimination in their employment practices only where a "primary objective" of the assistance is to provide employment. 42 U.S.C. § 2000d-3 (1988).

In *Alexander* v. *Choate*, 469 U.S. 287 (1985), this Court also examined the legislative history of Section 504 in order to determine whether the statute covered disparate-impact discrimination. The Court did not extend to Section 504 its ruling in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), that Title VI itself did not prohibit disparate-impact discrimination [5] because "we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Alexander*, 469 U.S. at 299. The Court emphasized that "too facile an assimilation of Title VI law to § 504 must be resisted." *Id.* at 293 n.7.

To the extent that this Court's ruling here limits the availability of remedies under Titles VI or IX, any extension of that ruling to Section 504 in this case would run counter not only to the Supreme Court's practice of considering Section 504 questions in the context of a fully developed examination of that section and its legislative history, but to *Consolidated Rail Corp.* and *Alexander*, wherein the Court refused to extend automatically limitations on Title VI remedies to Section 504. Moreover, the extension to Section 504 of any holding limiting the availability of compensatory damages would also result in this Court overruling, in the context of a case in which Section 504 has not been presented for decision, a large body of case law permitting recovery of such damages.[6] This Court should be wary to overrule this body

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[5] 463 U.S. at 610-11 (opinion of Powell, J., in which Burger, C.J. and Rehnquist, J., joined); *id.* at 612 (opinion of O'Connor, J.); *id.* at 635, 641-42 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined).

[6] *See Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504.") (citations omitted); *see also* note 22, *infra*. Moreover, one such case, *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982), was cited by Congress in the 1990 enactment of the ADA as an accurate judicial interpretation of congressional intent to provide a private remedy for money damages under Section 504. H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52 & n.62, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475.

of case law absent full consideration of issues in a Section 504 case.

II. CONGRESS INTENDED COMPENSATORY DAMAGES TO BE AVAILABLE UNDER SECTION 504

A. Judicial Doctrine Applicable Both In 1973, When The Rehabilitation Act Was Enacted, And During Its Later Amendments Established The Availability Of Monetary Damages To Redress Violations Of Federal Civil Rights

As this Court stated in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), the basic purpose of Section 504 "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." [7] In enacting Section 504 in 1973, and in the subsequent amendments to the Rehabilitation Act, Congress legislated with the understanding [8] that the full range of judicial remedies was available to redress invasions of federal rights. *See Bell*

[7] "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

[8] When determining whether a rule is implicit in a federal statutory scheme, "the initial focus must be on the state of the law at the time the legislation was enacted" and this Court "must examine Congress' perception of the law that it was shaping or reshaping." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982). As this Court has said, "[i]t is always appropriate to assume that our elected representatives * * * know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979); *see Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

v. *Hood*, 327 U.S. 678, 684 (1946); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).[9] Congress' intent was thus that all remedies were available to enforce statutory rights unless specifically precluded by the legislation granting the rights. That this judicial presumption may have shifted, or have been subject to exceptions, in case law subsequent to 1978 has no relevance to an interpretation of what Congress intended in enacting or amending the Rehabilitation Act in 1973, 1974, and 1978, which must be analyzed in light of contemporaneous case law.[10]

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[9] This presumption was equally applicable to the enactments of Title VI in 1964 and Title IX in 1972 for Congress clearly intended that all judicial remedies be available to enforce federal rights under these statutes as well. As demonstrated by petitioner and *amici* National Women's Law Center, *et al.* and Lawyers' Committee for Civil Rights Under Law, compensatory damages are available for intentional violations of Titles VI and IX.

[10] There can also be no doubt that there is a private cause of action under Section 504. Both the language of the Rehabilitation Act and its legislative history make clear Congress' intent to have a private cause of action available to enforce Section 504. In the first set of amendments in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. Moreover, in 1978, Congress enacted a law allowing a prevailing party, other than the United States, to recover reasonable attorneys' fees in Section 504 cases. 29 U.S.C. § 794a(b). This provision was specifically designed to continue the availability of private causes of action under Section 504. Congress recognized that private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978).

In fact, the Solicitor General has previously admitted that to assert otherwise "is inconsistent with the language and history of the Rehabilitation Act." Brief for Solicitor General at 6-7, *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984) (LEXIS, Genfed library, Briefs file). According to the Solicitor General, espousing that there is no private cause of action "cannot be squared

The applicability of *Bell* v. *Hood's* presumption of a full range of judicial remedies to redress invasions of federal rights is discussed in detail in *Miener* v. *Missouri*,[11] where the Eighth Circuit found that Congress intended this presumption to apply to Section 504. Relying on the 1978 legislative history (discussed in detail below), the court explained that "[i]t is obvious that administrative remedies are inadequate to vindicate individual rights and that Congress could not have expected the individual plaintiff to be made whole through administrative procedures." *Miener*, 673 F.2d at 978. The court thus held "[w]e indulge the presumption of *Bell* v. *Hood*, * * * that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable under § 504." *Id.*[12]

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with this Court's decision in *Cannon* * * * which held that a virtually identical provision in Title IX of the Education Amendments of 1972 * * * created a private right of action." *Id.* at 7.

[11] 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982). *Miener* was explicitly cited by Congress in 1990 when the remedial provisions of Section 504 (*i.e.*, Section 505(a)(2)) were reenacted in the ADA. *See infra* Section D.

[12] It was not until 1979 that the presumption in favor of broad remedial grants was even arguably reversed by *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). In *Transamerica*, this Court stated that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 19. This pronouncement, however, was directly contrary to prior judicial statutory interpretation of which Congress can be presumed to have been aware when it enacted and twice amended the Rehabilitation Act. For a full analysis of the principles espoused in *Bell* v. *Hood* and *Sullivan*, *see* Briefs of *amici* National Women's Law Center, *et al.* and Lawyers' Committee for Civil Rights Under Law.

Moreover, the *Miener* court distinguished *Transamerica* in the context of Section 504, and held that even if *Transamerica* could be construed to shift the burden of proof to require a specific showing of congressional intent to create a damages remedy, "appellant can discharge that burden." *Miener*, 673 F.2d at 977-78 & n.8.

B. The Legislative History Of The 1978 Amendments Reveals Congress' Intent To Enhance The Ability Of Individuals With Disabilities To Ensure Compliance With Section 504 And Not To Limit Available Remedies

In 1978, Congress amended the Rehabilitation Act, adopting Section 505(a)(2), which provides:

> The remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * under section 504 of this Act.

Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified at 29 U.S.C. § 794a(a)(2) (1988)). As this Court recognized in *Consolidated Rail Corp.*, 465 U.S. at 635, the legislative history of the 1978 amendments makes clear that Section 505(a)(2) was "'designed to enhance the ability of handicapped individuals to assure compliance'" with Section 504 (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)). Congress, therefore, clearly intended to expand the remedies available to enforce Section 504, rather than limit the relief available to victims of discrimination.

This interpretation of Section 505(a)(2) is consistent with the purpose of the 1978 amendments as a whole, as expressed by the legislators enacting them. The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation was to expand the opportunities for people with disabilities. Senator Randolph, the floor manager, opened the debate by asserting that "[a]ll of the provisions of this bill * * * not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec. 30,305 (1978). Senator Javits announced that the bill would "properly expand structures currently in place

to protect the rights of [citizens with disabilities]." *Id.* at 30,312.

This Court has already concluded that Congress' intent in incorporating Title VI "remedies, procedures and rights" into Section 505(a)(2) in 1978 was "to codify the regulations of the Department of Health, Education and Welfare governing enforcement of § 504." *Consolidated Rail Corp.*, 465 U.S. at 635 (citation omitted). For as the Senate Report states: "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." S. Rep. No. 890, 95th Cong., 2d Sess. 19; *see Consolidated Rail Corp.*, 465 U.S. at 635 n.16.

The referenced Section 504 regulations [13] incorporate Title VI regulations [14] pertaining to administrative remedies, rights and procedures. This incorporation of Title VI administrative procedures furthered the congressional goal of administrative consistency expressed in 1974.[15]

Nothing in Section 505(a)(2)'s incorporation of Title VI administrative remedies or the regulatory codification was intended to alter Congress' intent to have a Section 504 "judicial remedy through a private action" which

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[13] *See* 45 C.F.R. part 84 (1990).

[14] *See* 45 C.F.R. §§ 80.6-80.10 and 45 C.F.R. part 41 (1990).

[15] The Senate Report to the 1978 amendments states: "The joint explanatory statement accompanying the conference report on H.R. 14226 (the Rehabilitation Act Amendments of 1974) * * * noted that application of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal Government." S. Rep. No. 890, 95th Cong., 2d Sess. 19.

was, as noted above, expressly identified in the 1974 legislative history as *independent* of administrative remedies. S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. The referenced "judicial remedy" included the full measure of remedies available at that time. There is no evidence in the legislative history that Congress intended in any way to limit the availability of damages. To the contrary, as this Court recognized in *Consolidated Rail Corp.*, Congress intended to enhance the ability of individuals to vindicate violations of Section 504.[16]

The provision for counsel fees contained in Section 505(b) similarly evidences Congress' intent to facilitate rather than impede private enforcement of Section 504.[17] *See* 29 U.S.C. § 794a(b). The legislative history of the 1978 amendments further demonstrates that Congress knew how to incorporate limitations if it wished to do so. Section 104 of the 1978 amendments accorded to individuals with disabilities the right to an administrative hearing to review rehabilitative plans prepared for them by

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[16] For these reasons, the majority of circuit courts that have addressed the issue have held that compensatory damages are available to redress violations of Section 504. *See, e.g., Smith* v. *Barton*, 914 F.2d 1330 (9th Cir. 1990); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir. 1982). In light of this legislative history, the Fourth Circuit's recent decision in *Eastman* v. *Virginia Polytechnic Institute & State University*, No. 90-1453 (July 12, 1991) (WESTLAW, Allfeds library), clearly misinterpreted congressional intent when it held that compensatory damages were barred as a result of the 1978 amendments.

[17] The 1978 Senate Report states that an attorneys' fee provision was necessary to assist " 'disabled people, who desperately need to vindicate their rights through the courts.' " S. Rep. No. 890, 95th Cong., 2d Sess. 19 (quoting testimony of Deborah Kaplan of the Disability Rights Center before the Subcommittee on the Handicapped). This is a clear indication of Congress' awareness of the necessary role of private litigation to vindicate rights under Section 504 and its intention to facilitate the ability of individuals to seek redress in the courts.

state agencies, and if the plans were upheld, to challenge them in federal court. 124 Cong. Rec. 30,292 (1978). Proposed subsection 104(f) expressly provided "No civil action may be brought under this section for monetary damages."[18] *Id.* at 30,293; *see also id.* at 30,315 (remarks of Sen. Javits). The failure of Congress to include similar language in Section 505(a)(2) evidences the absence of any intention to impose such a limitation on relief in Section 504 cases.

In light of legislative history expressing a clear intent to expand remedial protections, and the absence of any statutory language of limitation, there can be no credible suggestion that the incorporation provision of Section 505(a)(2), which expressly bolstered administrative enforcement mechanisms, simultaneously silently evidenced congressional intent to limit judicial remedies. "[I]t would be anomalous to conclude that the section, 'designed to enhance the ability of handicapped individuals to assure compliance with [Section 504]' * * * silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients * * *." *Consolidated Rail Corp.*, 465 U.S. at 635.

C. The 1986 Amendments Evidence Congress' Intent To Allow Compensatory Damages In Actions Enforcing Section 504

In 1986, Congress made clear its intent to allow compensatory damages under Section 504 when it passed the Remedies Act.[19] The Remedies Act responded to the

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[18] Ultimately, the conference committee replaced the civil action authorized by Section 104 with a right of review by the Secretary of HEW, and subsection (f) was thus eliminated as irrelevant. H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 68-69 (1978).

[19] This statute, in part, provides:

> In a suit against a State for a violation referred to in paragraph (1) remedies (including remedies both at law and in equity) are available for such a violation to the same extent

Court's finding in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), that the eleventh amendment barred the imposition of monetary damages against states in federal courts. The Remedies Act, therefore, allowed damage awards, including those available at law, to be awarded against states to the same extent that they were available against non-state entities. Given that injunctive relief was already available against state officials, Congress would not have passed a statute that merely provided relief already available. Because compensatory damages were allowed against non-state entities when this statute was enacted in 1986, the Remedies Act makes those damages available against states.

1. *To Limit Awards For Violations Of Section 504 To Injunctive Relief Would Make The Remedies Act Of 1986 Meaningless*

Congress intends its enactments to have meaningful effect, and this Court must, therefore, construe a statute to give it such an effect. *United States* v. *American Trucking Associations*, 310 U.S. 534, 542 (1940); *Sutton* v. *United States*, 819 F.2d 1289, 1295 & n.9 (5th Cir. 1987) (" 'basic principle of statutory construction . . . [is] that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant" ' ") (quoting *Woodfork* v. *Marine Cooks and Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981), quoting *Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)). In this case, not to allow awards of compensatory damages under the Remedies Act would make the statute superfluous and insignificant.

Congress created the Remedies Act in order to fill a gap left by this Court's decision in *Atascadero*. In that case, the Court held that retroactive monetary relief under Section 504 could not be awarded against states because Congress had not abrogated, nor had the states waived, the states' eleventh amendment immunity.[20] It is, however, well-established that state officials may be subjected to injunctive relief when they violate federal laws such as Section 504. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 667-68 (1974); *Ex parte Young*, 209 U.S. 123 (1908). Thus, even after *Atascadero*, a private person could bring an action against state officials to force states to comply with federal law. To limit the Remedies Act to duplicating the type of relief already available against states would eviscerate the statute.

Congress responded to *Atascadero* because the Supreme Court had "misinterpreted congressional intent." S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). Indeed, during the debate on the 1986 amendments, Congress made clear that it envisioned compensatory damages being available to enforce Section 504. As Senator Cranston, the author and sponsor of the Remedies Act, explained, even though injunctive relief was still available against states after *Atascadero*, such relief was inadequate:

> As the courts have acknowledged, Congress created a right of action in Federal or State court to remedy violations of section 504—with no exception in the law either from [sic] the States *or for any particular type of remedy, such as monetary damages.*
>
> Nevertheless, on June 28, 1985, in the case of Atascadero State Hospital versus Scanlon, the Supreme Court held * * * that the individual's claim for *compensatory damages* against the State or a State agency could not be heard in Federal court.
>
> The same holding also applies to injunctions, but it is well established that the 11th amendment does not bar Federal courts from issuing injunctions against named State officials, as distinguished from

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as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2) (1988).

[20] In *Atascadero*, "[r]espondent sought compensatory, injunctive, and declaratory relief." 473 U.S. at 236.

the State itself, even though the effect is exactly the same as an injunction against the State. Therefore, as the result of Atascadero, injunctive relief is now the only relief available in Federal court against a State agency for a violation of section 504 or any other civil rights statute on the receipt of Federal financial assistance.

* * * *

As a result of the Court's decision, a disabled individual who has suffered unfair discrimination at the hands of a State agency has two choices—a suit in State court for damages or injunctive relief, or both, or Federal suit for an injunction against individual State officials. Those choices are not adequate.

132 Cong. Rec. S15,104 (daily ed. Oct. 3, 1986) (remarks of Sen. Cranston) (emphasis added).[21] This Court has noted that comments by sponsors of language ultimately enacted "are an authoritative guide to the statute's construction." *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 526-27 (1982). Consequently, to hold

[21] As Senator Cranston recognized, injunctive relief alone is inadequate because:

> In a very real sense, the availability of only injunctive relief postpones the effective date of the antidiscrimination law * * * to the date on which the court issues an injunction because there is no remedy available for violations occurring before that date.

132 Cong. Rec. S15,105 (daily ed. Oct. 3, 1986). Many courts have confronted the inadequacy of injunctive relief as a remedy for past discrimination and have concluded compensatory damages were the only possible means of providing a remedy for educational, social or employment opportunities lost to individuals as a consequence of discrimination. *See, e.g., Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D.N.J. 1980) (plaintiff excluded from high school wrestling program awarded compensatory damages because of graduation from high school prior to court's decision); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939 (S.D.N.Y. 1980) (compensatory damages awarded to plaintiff excluded from educational services by state agencies because of disability).

now that the law passed to overturn the effect of *Atascadero* is limited to injunctive relief, which already existed, would completely eviscerate the Remedies Act and render it nugatory.

2. *Congress' Purpose In Responding To* Atascadero *Was To Affirm Existing Case Law Providing For The Award Of Compensatory Damages Against Non-State Entities And To Extend This Law Against States*

The Remedies Act extended the relief already available against non-states to states. Thus, if the law in 1986 was that persons other than states were subject to monetary damages, then the Remedies Act subjected states to such damages. In fact, prior to the Remedies Act in 1986, the federal courts had routinely and consistently recognized the right to monetary damages, including compensatory damages, under Section 504.[22] Consequently,

[22] *See Smith* v. *Robinson*, 468 U.S. at 1020 n.24 ("courts generally agree that damages are available under Section 504"); *Moore* v. *Warwick Public School District No. 29*, 794 F.2d 322, 325 (8th Cir. 1986) (holding that individual plaintiffs have an implied cause of action for damages under Section 504); *Kling* v. *County of Los Angeles*, 769 F.2d 532, 534 (9th Cir.) (damages an appropriate remedy under Section 504, especially where injunctive relief has not remedied the harm), *rev'd on other grounds*, 474 U.S. 936 (1985); *Ciampa* v. *Massachusetts Rehabilitation Commission*, 718 F.2d 1, 5 (1st Cir. 1983) (assuming, but not deciding, that damages may be awarded under Section 504); *Monahan* v. *Nebraska*, 687 F.2d 1164, 1169 (8th Cir. 1982) (holding that a private action for damages is available), *cert. denied*, 460 U.S. 1012 (1983); *Miener* v. *Missouri*, 673 F.2d 969, 978 (8th Cir.) (legislative history of the Rehabilitation Act and inadequacy of its administrative remedies indicate that Congress intended to create a private right of action for damages), *cert. denied*, 459 U.S. 909 (1982); *Greater Los Angeles Council of Deafness, Inc.* v. *Zolin*, 607 F. Supp. 175, 181 n.10 (C.D. Cal. 1984) (recognizing the availability of monetary damages under Section 504), *aff'd*, 812 F.2d 1103 (9th Cir. 1987); *Fitzgerald* v. *Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) ("full panoply of remedies is available to a private plaintiff under § 504"); *Bachman* v. *American Society of Clinical Pathologists*, 577 F. Supp. 1257, 1262

because it was clear that compensatory damages were already available against non-state entities under Section 504, Congress did not need to specify these remedies when it responded to *Atascadero*.

(D.N.J. 1983) (plaintiffs may seek affirmative injunctive relief and monetary compensation under Section 504); *Wilder* v. *City of New York*, 568 F. Supp. 1132, 1135 (E.D.N.Y. 1983) ("inadequacy of injunctive and declaratory relief to compensate a particular plaintiff warrants the award of monetary damages"); *David H.* v. *Spring Branch Independent School District*, 569 F. Supp. 1324, 1340 (S.D. Tex. 1983) (Section 504 allows the recovery of monetary costs resulting from discrimination); *Nelson* v. *Thornburgh*, 567 F. Supp. 369, 383 (E.D. Pa. 1983) (Congress intended that the full panoply of remedies be available under Section 504), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Christopher N.* v. *McDaniel*, 569 F. Supp. 291, 296 (N.D. Ga. 1983) (damages available under Section 504 because of inadequacy of administrative enforcement remedies provided by the Rehabilitation Act); *Sanders by Sanders* v. *Marquette Public Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) ("remedies provided under the regulations promulgated to enforce the [Rehabilitation] Act will not provide relief to the aggrieved plaintiff"); *Hurry* v. *Jones*, 560 F. Supp. 500, 511 (D.R.I. 1983) (administrative remedies under Section 504 are inadequate to vindicate individual rights and plaintiff is entitled to compensatory damages for pain and suffering), *rev'd on other grounds*, 734 F.2d 879 (1st Cir. 1984); *Gelman* v. *Department of Education*, 544 F. Supp. 651, 654 (D. Colo. 1982) (compensatory damages available under Section 504); *Christopher T.* v. *San Francisco Unified School District*, 553 F. Supp. 1107, 1121 n.44 (N.D. Cal. 1982) (inadequacy of the Rehabilitation Act's remedial procedures strongly suggests that Congress intended that damages remedy be available to plaintiffs); *Philipp* v. *Carey*, 517 F. Supp. 513, 520 (N.D.N.Y. 1981) (Section 504 provides no exclusive remedies and an action may lie under 42 U.S.C. § 1983); *Hutchings* v. *Erie City and County Library Board of Directors*, 516 F. Supp. 1265, 1269 (W.D. Pa. 1981) (monetary damages available under Section 504 since nothing in statutory language or legislative history suggests Congress intended to limit suits to injunctive relief); *Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D.N.J. 1980) (monetary damages available because there are many plaintiffs for whom injunctive relief comes too late); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939 (S.D.N.Y. 1980) ("Where * * * money damages are the

Indeed, this Court had previously acknowledged that "courts generally agree that damages are available under § 504 * * *." *Smith*, 468 U.S. at 1020 n.24. In light of the case law providing for compensatory damages prior to the Remedies Act in 1986, as well as the Supreme Court's expression of its view of the law, "it is abundantly clear that" the right to receive compensatory damages against non-state entities under Section 504 was a part of the "contemporary legal context" in which Congress legislated in 1986. *See Merrill Lynch*, 456 U.S. at 381. Consequently, Congress plainly intended for compensatory damages to be available under Section 504 when it extended those remedies then available against non-state entities to states. *See* note 22, *supra*.

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only means of compensating a victim of past discrimination, that remedy must be available to the plaintiff."); *cf. Carter* v. *Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984) (plaintiff must show intentional discrimination by the defendant to recover damages); *Scokin* v. *Texas*, 723 F.2d 432, 441 (5th Cir. 1984) (same); *Powell* v. *Defore*, 699 F.2d 1078, 1082 (11th Cir. 1983) (same); *Marvin H.* v. *Austin Independent School District*, 714 F.2d 1348, 1357 (5th Cir. 1983) (same); *Sabo* v. *O'Bannon*, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984) (damages unavailable under Section 504 in the absence of allegation of intentional discrimination). *But see Byers* v. *Rockford Mass Transit District*, 635 F. Supp. 1387, 1391 (N.D. Ill. 1986) (Section 504 damages limited to equitable relief available under Title VII); *Bradford* v. *Iron County C-4 School District*, 37 Empl. Prac. Dec. (CCH) ¶ 35,404 (E.D. Mo. June 13, 1984) (compensatory damages for mental suffering unavailable under Section 504); *DuVall* v. *Postmaster General, United States Postal Service*, 585 F. Supp. 1374, 1377 (D.D.C. 1984) (Section 504 remedies limited to equitable relief), *aff'd mem.*, 774 F.2d 510 (D.C. Cir. 1985); *Longoria* v. *Harris*, 554 F. Supp. 102, 107 (S.D. Tex. 1982) (monetary damages unavailable under Section 504); *Gregg B.* v. *Board of Education of Lawrence School District*, 535 F. Supp. 1333, 1339-40 (E.D.N.Y. 1982) (monetary damages limited to back pay or tuition reimbursement allowed under Section 504); *Ruth Anne M.* v. *Alvin Independent School District*, 532 F. Supp. 460, 473 (S.D. Tex. 1982) (award of monetary damages not allowed under the Rehabilitation Act).

Moreover, Congress is presumed to be aware of judicial interpretations of a statute and, therefore, it adopts such interpretations when it reenacts a statute without a change. *Merrill Lynch*, 465 U.S. at 382 & n.66 ("comprehensive reexamination and significant amendment of the [Commodities Exchange Act which] left intact statutory provisions under which federal courts had implied cause of action is itself evidence that Congress affirmatively intended to preserve that remedy"). By extending those remedies previously available against non-state entities, Congress acted affirmatively to preserve those existing remedies, including in the case of Section 504, compensatory damages, when it passed the Remedies Act in 1986.

D. The Incorporation Of Section 505(a)(2) Remedies Into Title II Of The Americans With Disabilities Act Of 1990 Constitutes A Congressional Reenactment Of The Remedial Provisions Of Section 504 Mandating A Judicial Damages Remedy

Congress' intent that the incorporation of Title VI administrative remedies should not be construed as limiting availability of judicial remedies is further evidenced by legislative history accompanying the recent enactment of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991). The incorporation of Section 505 remedies into Section 203 of the ADA constituted a reenactment of the remedial provisions of Section 504, and the 1990 legislative history both establishes and ratifies the intent of Congress in 1978 to provide a judicial damages remedy for enforcement of the nondiscrimination mandate of the Rehabilitation Act.

Section 203, pertaining to the enforcement of Title II of the ADA, provides:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

ADA, Pub. L. No. 101-336, § 203, 104 Stat. 328, 337 (1990) (codified at 42 U.S.C.A. § 12133). The legislative history of Section 203 specifically cites *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982) (a leading case allowing an award of compensatory damages to enforce Section 504), and expressly and unequivocally states, "The Rehabilitation Act provides a private right of action, with a full panoply of remedies available, as well as attorney's fees." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475.[23] Congress clearly endorsed and adopted the judicial interpretation provided by *Miener*, holding that a judicial remedy for damages was available under Section 504.[24]

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[23] H.R. Rep. No. 485 Part 3 recites this legislative history relative to "Section 205," the precursor section to that which was ultimately identically codified as Section 203 of the ADA.

[24] As discussed above, Section 505(a)(2) of the Rehabilitation Act states the remedies of Title VI "shall be available" to enforce Section 504. 29 U.S.C. § 794a(a)(2) (1988). By contrast, Section 203 of the ADA states that Section 505 remedies "shall be the remedies" of Title II of the ADA. 104 Stat. 337, 42 U.S.C.A. § 12133 (West Supp. 1991). In enacting the ADA, the House Judiciary Committee "adopted an amendment to delete the term 'shall be available' in order to clarify that the Rehabilitation Act remedies are the *only* remedies which Title II provides for violations of Title II." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475 (emphasis added). This 1990 clarification, designed to establish congressional intent to limit Title II ADA remedies to those of Section 504 through specific incorporation of only those remedies, is further evidence that Congress did not intend, in 1978, to limit the Section 504 remedies to those of Title VI. The 1990 legislative history of the ADA makes clear that the "shall be available" language is not a limitation, because Congress found it necessary to utilize more precise language when it sought to limit remedies to those which had been previously adopted. Moreover, by enacting Title II of the ADA, Congress effectively reenacted Section 505(a)(2), as then interpreted, thereby establishing Congress' intent that a judicial remedy for damages be available to redress violations of Section 504.

CONCLUSION

For the foregoing reasons, this Court should not examine Section 504 in this action. If the Court does undertake such an examination, the Court should find that Section 504 violations may be remedied by awards of compensatory damages.

Respectfully submitted,

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